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MOHD SUHAIRI ALIAS & ANOR v. TUNE INSURANCE MALAYSIA BHD & ORS

COURT OF APPEAL, PUTRAJAYA
RAVINTHRAN PARAMAGURU JCA
MOHD NAZLAN GHAZALI JCA
B CHOO KAH SING JCA
[CIVIL APPEAL NO: W-02(NCC)(A)-1160-06-2021]
1 AUGUST 2025

C **Abstract** – *(i) An insurance policy that is purchased after an accident occurred is not enforceable under s. 96 of the Road Transport Act 1987 ('RTA'); there is no insurance coverage at the material time of the accident. Section 96(3) of the RTA allows an insurer to void a policy by seeking a declaration to that effect before the date of liability which is the* D *date of the running down judgment; (ii) The s. 96(3) avenue applies to all litigants in the same class as the insurer, the insured and the third-party victim. There is nothing discriminatory in it against a third party victim.*

E ***INSURANCE:*** *Motor insurance – Policy – Enforceability of – Road accident between car and motorcycle – Whether car insured at time of incident – Cover note of policy issued on same day as accident – Whether policy purchased and issued after accident occurred – Whether there was assumption of risk with regard to accident – Whether policy extended to accident in question – Whether there was insurance coverage at material time of accident – Road Transport Act 1987, s. 96(3)*

F ***ROAD TRAFFIC:*** *Insurance – Third party claims – Road accident between car and motorcycle – Enforceability of policy – Whether car insured at time of incident – Cover note of policy issued on same day as accident – Whether policy purchased and issued after accident occurred – Whether there was assumption of risk with* G *regard to accident – Whether policy extended to accident in question – Whether there was insurance coverage at material time of accident – Road Transport Act 1987, s. 96(3)*

CIVIL PROCEDURE: *Proceedings – Mode of commencement – Application under s. 96(3) of Road Transport Act 1987 for declaration that insurance policy purchased* H *and issued after accident occurred void and not enforceable – Whether originating summons proper mode of commencement of proceedings – Whether triable issues arose that merit matter to be decided at trial – Doctrine of waiver – Whether applicable – Whether there was infringement of constitutional right under art. 8 of Federal Constitution*

I This was an appeal against the decision of the High Court granting a declaration under s. 96(3) of the Road Transport Act 1987 ('RTA') in favour of the insurer in respect of an accident that allegedly occurred before the said policy was issued. An accident occurred on 20 March 2019 at about 10am

when a car driven by the first defendant collided with the motorcycle ridden by the first appellant. The first appellant was seriously injured in the accident and filed a claim for damages through his litigation representative, his mother, the second appellant, at the Sessions Court against the first defendant and the second defendant, the registered owner of the car. When the first respondent, as the insurer of the car, was notified of the suit by the appellants in accordance with s. 96(2) of the RTA, they applied for a declaration under s. 96(3) that the policy was void and, in the alternative, not enforceable in respect of the accident in question. The application was opposed by the appellants. The facts showed that the documents procured during investigation by the adjuster indicated the car was not insured at the time of the incident. The cover note of the policy was issued on 20 March 2019, the very day the accident occurred. Similarly, the confirmation of purchase of insurance also stated that the policy was issued on 20 March 2019 at precisely 11.04am. The main ground of the respondent's application was that the policy was purchased and issued after the accident. The respondent pursued its application on the ground that there was no insurance policy at the time of the accident and that the policy in question did not operate retroactively from 12 midnight the previous day. The Judicial Commissioner ('JC') of the High Court made a finding that the accident occurred before the purchase of the insurance policy and for that principal reason, the JC allowed the s. 96(3) application and granted the alternative remedy for a declaration that the insurance policy was not enforceable with respect to the accident in question. The main issue in this case was whether there was an enforceable policy at the time of the accident. The sub-issues that arose were (i) whether originating summons was the proper mode of commencement of action; (ii) whether the existence of triable issues rendered originating summons unsuitable; (iii) time commencement of policy; (iv) whether the doctrine of waiver applied; and (v) whether the constitutional right of appellants under art. 8 of the Federal Constitution was infringed.

Held (dismissing appeal)

Per Ravinthran Paramaguru JCA delivering the judgment of the court:

(1) An application under s. 96(3) of the RTA is an application pursuant to written law for relief and thus, ordinarily by virtue of O. 5 r. 3 of the Rules of Court 2012 ('ROC'), originating summons is the proper mode of commencement of proceedings. The mode of commencement by way of originating summons herein was entirely proper. (paras 13 & 14)

(2) There was no error in the finding of the High Court that the accident occurred at about 10am on the day in question. The first defendant, who was the driver of the car, made police report about 12 hours after the accident, *ie*, at 10.22pm. However, he unequivocally stated that the accident occurred around 10am on the same day. The other police report

A that the High Court properly took into consideration was the police report of the first appellant's sister, stating that she received a telephone call on 20 March 2019 at around 10.30am from an unknown person who told her about an accident involving her brother. Therefore, the High Court was not wrong in finding that the time of the accident was not a B triable issue. (paras 17, 19 & 23)

(3) As for the time and date of purchase of the policy, the evidence was clear cut. The cover note which, under s. 2 of the Financial Services Act 2013 ('FSA'), was part of the insurance policy clearly stated that it was issued only at 11.04am on the morning of the accident. The confirmation of C purchase of insurance also stated that the insurance cover note was issued at 11.04am. The driver of the car himself lodged a police report stating that he purchased the policy after the accident. In his statutory declaration, he affirmed the same thing and said he purchased the policy as he was advised by the police that his insurance policy and road tax D had expired. The previous policy had expired in January of the same year and there was a gap in the third-party insurance coverage until the impugned policy was purchased at 11.04am on the day of the accident. The first defendant was driving the car owned by the second defendant without any third-party insurance coverage at the time of the accident. That was the plain and incontrovertible fact. The High Court did not err E in making a factual finding that the policy was only purchased at 11.04am on the day of the accident. (paras 24 & 25)

(4) As the evidence was clear that the policy was purchased after the accident, in law, there could have been no assumption of risk with F regard to the accident in question. Section 84 of the FSA prevents an insurer from assuming risks unless the premium payable is paid. Thus, the argument that there were triable issues and therefore a trial should be held to determine the enforceability of the insurance policy was without merit. Furthermore, s. 96(3) allows the insurer to void the G policy if it obtains a declaration from the court before the date of liability. The liability of the insurer only arises when judgment is entered against it. Therefore, an insurer who elects to seek a remedy under s. 96(3) does not have to wait until the running down action is tried in the Sessions Court. Furthermore, there was no triable issue with respect to the critical question of fact which was the time of the accident H compared to the time of purchase of the insurance policy. (paras 27, 36 & 37)

(5) Had the first respondent invoked the doctrine of *uberrima fides*, sub-paras. (1), (3) and (5), para. 5 of Schedule 9 of the FSA would not I have assisted the appellants to defeat it. First, the questions which the insurer was obliged to pose under sub-paras. (1) and (2) pertain to 'risk'.

The meaning of 'risk' is not defined in Schedule 9 of the FSA. Its ordinary dictionary meaning denotes the possibility of something adverse, such as damage or loss, occurring in the future. This aligned with the speculative nature of an insurance contract. In this context, it would be illogical to expect the insurer to ask any question under sub-paras. (1) and (3) concerning a 'risk' that had already materialised. It may fairly be said that the accident in question did not constitute a 'risk' as it had already taken place. Accordingly, reliance upon sub-para. (5) of para. 5 of Schedule 9 of the FSA, to assert a waiver for failing to inquire about the accident in question, was wholly untenable. Further, sub-para. (9) of para. 5 of Schedule 9 of the FSA expressly provides that nothing in the schedule shall affect the mutual duty of utmost good faith owed by both the insurer and the insured. Therefore, the first defendant ought to have disclosed to the insurance agent that the vehicle in question had been involved in an accident immediately prior to the renewal of the insurance policy. (paras 40 & 41)

(6) Section 96(3) allows an insurer to avoid a policy by seeking a declaration to that effect before date of liability which is the date of the running down judgment. The ROC provide for various matters that can be decided on affidavit evidence. They range from summary judgment applications to judicial review applications which sometimes involve matters of high constitutional importance. The s. 96(3) avenue applies to all litigants in the same class as the insurer, the insured and the third-party victim. Thus, the right of the insurer to obtain a declaration that a motor insurance policy is void or unenforceable under s. 96(3) is not discriminatory against a third-party accident victim. As for the mode of proceeding, *ie*, whether by exchange of affidavits in an originating summons or by way of a full trial, in this court's view did not, in itself, bear upon the question of an infringement of the equality provision of the Federal Constitution. (paras 43 & 44)

(7) The JC did not declare the entire policy void. Instead, he granted the alternative prayer sought in the statement of claim. He granted a declaration that the policy did not extend to the accident in question, as the accident occurred prior to its purchase. The principal issue in this case was actually a narrow one: whether there was insurance coverage at the material time of the accident. This question was answered in the negative. (para 45)

Case(s) referred to:

Ahmad Nadzrin Abd Halim & Anor v. Allianz General Insurance Company (M) Bhd [2015] 9 CLJ 821 CA ***(refd)***

AmGeneral Insurance Bhd v. Sa' Amran Atan & Ors And Other Appeals [2022] 8 CLJ 175 FC ***(refd)***

Carter v. Boehm [1558-1774] All ER Rep 18 ***(refd)***

A *Liberty Insurance Bhd v. Marrison Sidai & Anor [2019] 8 CLJ 380 HC* ***(refd)***
National Insurance Company Ltd v. Mrs Chinto Devi And Ors (Civil Appeal No 1100 of 1992) [2000] 2 ACC 353 ***(refd)***
New India Assurance Co Ltd v. Smt Sita Bai & Ors [2000] 1 MLJ 50 ***(refd)***
Pacific & Orient Insurance Co Bhd v. Hameed Jagubar Syed Ahmad [2018] 9 CLJ 691 FC ***(refd)***

B **Legislation referred to:**
Federal Constitution, art. 8
Financial Services Act 2013, ss. 2, 84, 270, Schedule 9
Insurance Act 1996, s. 141
Road Transport Act 1987, s. 96(1), (2), (3)
C Rules of Court 2012, O. 5 rr. 3, 4

For the appellants - GK Ganesan, Kameswary Ramasamy, G Naidu, KN Geetha, TP Vaani, JN Lheela; M/s Kames & Assocs
For the respondents - Satvinder Singh Gill, Raymond Sivasothey, Roshvinder Singh; M/s Khalil Surinder & Assocs
D *For the 2nd & 3rd respondent - Unrepresented*

[Editor's note: Appeal from High Court, Kuala Lumpur; Originating Summons No: WA-24NCC-193-05-2020 (affirmed).]

Reported by Suhainah Wahiduddin

E

JUDGMENT

Ravinthran Paramaguru JCA:

Introduction

F **[1]** This is an appeal against the decision of the High Court that granted a declaration under s. 96(3) of the Road Transport Act 1987 (RTA) in favour of the insurer in respect of an accident that allegedly occurred before the said policy was issued. The argument of the insurer was that the policy was purchased about an hour after the accident and therefore it is not enforceable
G under s. 96 of the RTA. The declaration was obtained *via* an originating summons.

Background Facts

[2] The parties in the appeal and the High Court are as follows. The first
H and second appellants were the third and fourth defendants respectively in the High Court. The first appellant is the rider of a motorcycle. He was seriously injured in the accident. The second appellant is his mother. She is acting as his litigation representative. The first defendant was the driver of a car that collided with the motorcycle. The second defendant is the registered owner of the car. The first and second defendants did not oppose
I the application in the High Court and hence did not appeal the High Court's decision. The insurer of the car driven by the first defendant is the first respondent before us and was the plaintiff in the High Court.

[3] The accident in question occurred on 20 March 2019 at about 10am in Kuala Krai, Kelantan when the car (No. WEG 1591) driven by the first defendant collided with the motorcycle ridden by the first appellant. The first appellant was seriously injured in the accident and filed a claim for damages through his litigation representative in the Sessions Court at Kota Bharu against the first and second defendants. When the first respondent as the insurer of the car was notified of the suit by the solicitors of the appellants in accordance with s. 96(2) of the Road Transport Act 1987 (the RTA), they applied for a declaration under s. 96(3) that the policy is void and, in the alternative, not enforceable in respect of the accident in question. The application was opposed by the appellants. However, as we said earlier, the first and second defendants did not oppose the application. The High Court granted the alternative remedy for a declaration that the policy is not enforceable with respect of the accident in question.

Commencement Of Insurance Policy

[4] The documents procured during investigation by the adjuster indicated that the car was not insured at the time of the incident. The Road Transport Department (Jabatan Pengangkutan Jalan or JPJ) search result on insurance cover for the car in question revealed it was last insured by The Pacific Insurance Berhad between 8 January 2018 and 7 January 2019. There was no renewal of the insurance policy after 7 January 2019 until the date of the accident.

[5] We shall now turn to the material facts surrounding the issuance of the insurance policy in question on the day of the accident by the respondent. The cover note of the policy was issued on 20 March 2019, the very day the accident occurred. It is recorded in the cover note (JS-1 in the affidavit in support) that it was issued at 11.04.55am. Similarly, the confirmation of purchase of insurance also states that the policy was issued on 20 March 2019 at precisely 11.04.55am.

Application Of The First Respondent Before The High Court

[6] Section 96(1) deals with avoidance of liability with regard to third-party road accident victims. It states that notwithstanding that the insurer may be entitled to avoid the policy with regard to the insured, he shall pay subject to the said section with respect to third-party risks coverage. However, sub-s. (3) allows the insurer to avoid the policy if it obtains a declaration from the court before the date of liability which is the date of judgment given in respect of the third-party claim. Section 96(3) reads as follows:

> No sum shall be payable by an insurer under subsection(1) if before the date the liability was incurred, the insurer had obtained a declaration from a court that the insurance was void or unenforceable.

[7] The remedy sought by the first respondent in the instant originating summons before the High Court was for a declaration that the insurance policy is void or in the alternative for a declaration that it is not enforceable with respect to the accident in question. The main ground of the application was that the policy was purchased and issued after the accident occurred. The second ground raised in the affidavit in support was that the insured did not disclose a material fact, *ie*, that the vehicle was involved in a collision just prior to the purchase of the policy and therefore breached the principle of utmost good faith or *uberrima fides*. However, this ground was abandoned during argument. The first respondent pursued its application on the ground that there was no insurance policy at the time of the accident and that the policy in question did not operate retroactively from 12 midnight the previous day.

Decision Of The High Court

[8] Based on the affidavit evidence, the learned Judicial Commissioner at the High Court made a finding of fact that the insurance policy was purchased and issued after the accident in question. His Lordship relied on the date and time of issuance of the insurance policy stated in the cover note and the confirmation of purchase. His Lordship dismissed the contention of the appellants that this is a matter that is triable and not suitable to be determined on affidavit evidence. He also had regard to the JPJ search result that indicated that the insurance policy was previously insured between 8 January 2018 and 7 January 2019 and was not continuously insured thereafter. With respect to the argument of the appellant that the commencement date of the insurance coverage in the JPJ search result states "19 March 2019" and therefore it is a reference to the whole day as opposed to part of the day, the learned Judicial Commissioner referred to s. 84 of the Financial Services Act 2013 (FSA) that says no risk is assumed by an insurer unless and until the premium payable is received in such manner and within such time as may be prescribed by Bank Negara. His Lordship further held that no weight can be accorded to the JPJ search result with respect to the "whole day argument", as it merely indicates the commencement date of insurance coverage without specifying the exact time, given that its format does not accommodate such details.

[9] As for the time of the accident, the learned Judicial Commissioner considered the time stated in the police reports of the first defendant and the sister of the first appellant. In the upshot, His Lordship made a finding that the accident occurred before the purchase of the insurance policy. For that principal reason, the learned Judicial Commissioner allowed the s. 96(3) application and granted the alternative remedy for a declaration that the insurance policy was not enforceable with respect to the accident in question.

Our Decision

[10] The main issue in this case is whether there was an enforceable policy at the time of the accident. The s. 96(3) application by way of originating summons sought to void the policy and, in the alternative, sought a declaration that the policy did not cover the accident in question. The High Court granted the alternative relief that the policy did not cover the accident in question as it was purchased only after the accident occurred. We shall consider the sub-issues in the following order:

(i) whether originating summons is the proper mode of commencement of action?

(ii) whether existence of triable issues render originating summons unsuitable?

(ii) time of commencement of policy;

(iv) whether doctrine of waiver applies?

(v) whether constitutional right of appellants under art. 8 was infringed?

Proper Mode Of Commencement Of Action?

[11] We find no appealable error in the decision of the High Court that the originating summons was the proper mode of commencement of proceedings for a declaration under s. 96(3) of the RTA. We also find no error in the finding of the High Court that there is no triable issue in this case in any event. Our reasons are as follows.

[12] Section 96(3) read as follows in part:

> No sum shall be payable by an insurer under subsection(1) if before the date the liability was incurred, the insurer had obtained a declaration from a court that the insurance was void or unenforceable.

[13] The foregoing provision clearly provides the avenue for an insurer to avoid payment under third-party risk coverage before the date of liability. In *Ahmad Nadzrin Abd Halim & Anor v. Allianz General Insurance Company (M) Bhd* [2015] 9 CLJ 821, this court held that the date of liability is the date of judgment. An application under s. 96(3) of the RTA is an application pursuant to written law for relief and thus, ordinarily by virtue of O. 5 r. 3 of the Rules of Court 2012, originating summons is the proper mode of commencement of proceedings. Order 5 r. 3 reads as follows:

> *Proceedings which shall be begun by originating summons (O. 5 r. 3)*
>
> *Proceedings by which an application is to be made to the Court or a Judge thereof under any written law shall be begun by originating summons.*
>
> (emphasis added)

[14] For the above reason, the mode of commencement by way originating summons in entirely proper. Order 5 r. 4 also enacts where there is unlikely to be any substantial dispute of fact, the proper mode of commencement of proceedings is originating summons. It reads as follows:

> 4. Proceedings which may be begun by writ or originating summons (O. 5 r. 4) (1) Proceedings:
>
> 1.(a) in which the sole or principal question at issue is or is likely to be one of the construction of any written law or of any instrument made under any written law, or of any deed, will, contract or other document, or any other question of law; or
>
> 2.(b) in which there is unlikely to be any substantial dispute of fact, are appropriate to be begun by originating summons unless the plaintiff intends in those proceedings to apply for judgment under Order 14 or Order 81 or for any other reason considers the proceedings are more appropriate to be begun by writ.

Whether Any Triable Issue That Merits Matter Be Decided In A Trial?

[15] The argument of counsel for the appellants is that since there are triable issues, the s. 96(3) application should not be determined by way of originating summons but should be left to the trial court which is the Sessions Court that is hearing the personal injury action.

[16] We shall now examine whether there are triable issues in the first place with respect to the time of the accident and the time of commencement of the third-party insurance policy. In the petition of appeal, these are stated as triable issues. However, it is significant to note that in the affidavit in reply to the originating summons, the second appellant who is the litigation representative did not take issue with the time of accident. She only pleaded that the car in question was insured. We shall advert to her affidavit later.

Time Of Accident

[17] We find no error in the finding of the High Court that the accident occurred at about 10am on the day in question. The first defendant who was the driver of the car in question made a police report about 12 hours after the accident, *ie*, at 10.22pm. However, he unequivocally stated that the accident occurred around 10am on the same day. The first defendant lodged a second police report more than a year later stating that his car was not covered by insurance at the time of the accident and that his road tax had also expired. He categorically stated in the police report that he purchased the insurance policy in question after the accident. He also signed a statutory declaration on 1 June 2020 before the Commissioner for Oaths at the Kuala Krai Magistrates Court to that effect. He also said in the statutory declaration that he was advised by the police to buy insurance for the car. The said police reports were attached to the affidavit in support of the first respondent and the statutory declaration was attached to the affidavit in reply of the respondent.

[18] Counsel for appellant submitted that since the police report made by the first defendant on the day of the accident was at 10.22pm and insurance policy was purchased at 11.04am the same day, the police could not have advised him to purchase the policy after the accident. We see no merit in this argument. It assumes that the first defendant only encountered the police at 10.22pm when he went to the police station to make a report. It also assumes that despite the involvement of the defendant in a serious accident, he did not encounter the police at the scene of the accident. Furthermore, the first defendant did not say in his statutory declaration that the police advised him to lodge a report only when he made a report at night.

[19] The other police report that the High Court properly took into consideration is the police report of Norsuziani binti Alias. She is the sister of the first appellant. On 29 April 2019, which is more than a month after the accident, she lodged a police report stating that she received a telephone call on 20 March 2019 at around 10.30am from an unknown person who told her about an accident involving her brother. Her police report was exhibited in the affidavit in support of the respondent.

[20] However, apart from the police reports and the statutory declaration, it is also highly pertinent to note that the time of the accident, *ie*, whether it occurred at 10am or after the issuance of the cover note at 11.04am, was not an issue raised in the affidavit in reply of the second appellant who is the litigation representative of the seriously injured first appellant.

[21] In the affidavit in reply of the second appellant filed in response to the affidavit in support of the originating summons, the issue that was contested was whether the car was insured at the time of the incident and not the time of the accident itself. In fact, she stated that the accident occurred at 10am on 20 March 2019. This is clear from para. 7 of the affidavit sworn by the second appellant which we reproduce below for ease of reference:

> Saya adalah ibu yang sah dan juga sahabat wakil kepada Defendan Pertama di mana beliau adalah penunggang motosikal No. DBL 2506 yang terlibat dalam kemalangan (selepas ini dirujuk sebagai "kemalangan tersebut") pada 20.03.2019 jam lebih kurang 10.00 pagi di atau berhampiran Simpang Masjid Batu Balai – Cucuh Puteri, Kuala Krai, Kelantan Darul Naim dengan sebuah motorkereta No. WEG 1591 yang dipandu oleh Defendan Pertama dan dimiliki oleh Defendan Kedua dalam prosiding ini sebagaimana dalam maklumat yang terdapat dalam kad pendaftaran kenderaan No. WEG 1591 pada Tarikh dan masa kemalangan tersebut.

[22] Again, in para. 25 of the same affidavit, the second appellant took issue only with the time of commencement of the insurance coverage. The said paragraph reads as follows:

> Selanjutnya juga, saya telah dinasihat oleh peguamcara saya dan sebagai membalas perenggan 7 Afidavit Sokongan JS tersebut, saya menyatakan bahawa tiada sebarang keterangan dikemukakan oleh Plaintif terhadap

masa sebenar penguatkuasaan polisi insurans tersebut, jam yang tertera 11:04:55 pagi tersebut hanya menunjukkan tarikh polisi tersebut dikeluarkan dan dokumen tersebut adalah dokumen cetakan computer.

[23] She did not aver that the accident occurred after the insurance policy was purchased. In the premises, the second appellant had accepted the fact that the accident occurred around 10am as stated in the affidavit in support of the respondent. Therefore, the High Court was not wrong in finding that the time of the accident is not a triable issue.

Commencement Of Insurance Policy

[24] As for the time and date of purchase of the policy, the evidence is clear cut as found by the High Court. The cover note which under s. 2 of the FSA is part of the insurance policy clearly states that it was issued only at 11.04am on the morning the accident. The confirmation of purchase of insurance also states that the insurance cover note was issued at 11.04am. The driver of the car himself later lodged a police report stating that he purchased the policy after the accident. In his statutory declaration, he affirmed the same thing and said he purchased the policy as he was advised by the police that his insurance policy and road tax had expired. The High Court also correctly took into consideration on the fact that the previous policy had expired in January of the same year and there was a gap in the third-party insurance coverage until the impugned policy was purchased at 11.04am on the day of the accident. All these facts, though adduced through affidavits, unassailably points to the conclusion that in the instant case, the first defendant was driving the car owned by the second defendant without any third-party insurance coverage at the time of the accident. That is the plain and incontrovertible fact.

[25] In the premises, the determinative issue is a straightforward one: whether the vehicle was insured under the policy in question at the time of the accident. This is purely a question of law that turns on the timing of the policy's purchase. In our view, for reasons given earlier, the High Court did not err in making a factual finding that the policy was only purchased at 11.04am on the day of the accident. Therefore, as we said, what remains is the question of law as to the enforceability of the insurance policy. We shall, as did the learned Judicial Commissioner, turn to the relevant statutory provision and precedents in order to answer this question.

[26] The learned Judicial Commissioner correctly addressed this question by referring to s. 84 of the FSA which is similar to s. 141 of the repealed Insurance Act 1996. It reads as follows:

(1) No licensed insurer shall assume any risk in respect of such description of policy as may be prescribed by the Bank unless and until the premium payable is received by the licensed insurer in such manner and within such time as may be prescribed by the Bank.

[27] In this case, as the evidence is clear that the policy was purchased after the accident, in law, there could have been no assumption of risk with regard to the accident in question. Section 141 of the repealed Insurance Act 1996 was considered in *Pacific & Orient Insurance Co Bhd v. Hameed Jagubar Syed Ahmad* [2018] 9 CLJ 691; [2018] 12 MLJ 1 by the Federal Court.

[28] In that case, the policy was purchased some 12 hours after the accident. The accident occurred at 1.30am on 27 October 2011 whereas the insurance policy was purchased on the same day at 2.16pm on the same day. The High Court held that the insurer cannot be liable for accident that occurred before the purchase of the insurance policy. The Court of Appeal allowed the appeal and held that the contract of insurance commenced from midnight on 27 October 2011. It must be noted that in the instant case as well, one of the arguments of counsel for the appellant is that the insurance policy commenced on midnight of 20 March 2019 although the policy was only issued at 11.04am on the same day. The reason for this argument is that, although the policy was issued at 11.04am as reflected in both the cover note and the confirmation of purchase of policy, the cover note and the JPJ search result stated that the policy period spanned from 20 March 2019 to 19 March 2020.

[29] The Federal Court, however, granted leave on the following two questions of law:

(a) when a motor policy holder obtains insurance cover from an insurer in respect of an accident that had already occurred, does that insurance policy take effect from the date of cover or from the time of issuance of cover? and

(b) is the Court of Appeal correct in law to give a retrospective cover to the policy in breach of s. 141 of the Insurance Act 1996 (Act 553) which states that there shall be payment before cover?

[30] Adopting the approach of the Indian Supreme Court in *National Insurance Company Ltd v. Mrs Chinto Devi And Ors (Civil Appeal No 1100 of 1992)* [2000] 2 ACC 353 and *New India Assurance Co Ltd v. Smt Sita Bai & Ors* [2000] 1 MLJ 50, the Federal Court held where date and time of issue is stated in the cover note, it is a special contract and coverage commences from the time of issuance. In coming to this decision, the Federal Court had regard to s. 141 of the repealed Insurance Act 1996 which states that there can be no assumption of risk unless premium is paid and the principle that "insurance is contract based upon speculation" (per Lord Mansfield in *Carter v. Boehm* [1558-1774] All ER Rep 18; [1766] 3 Burr 1905). Therefore, the answer of the Federal Court to the first question was that the insurance policy takes effect from the time of issuance of the cover note. Consequently, the second question was answered in the negative which means that the Court of Appeal was wrong to decide that the policy in question gave retrospective coverage which was in breach of s. 141 of the Insurance Act 1996.

[31] We also find it apposite to mention a High Court case that was decided before the judgment of the Federal Court in *Insurance Co Bhd v. Hameed Jagubar Syed Ahmad* (*supra*) was made available. It was referred to by both counsel for the appellants and counsel for the first respondent. The case in question is *Liberty Insurance Bhd v. Marrison Sidai & Anor* [2019] 8 CLJ 380; [2019] 12 MLJ 763. The facts are a very similar to the instant case. It involved the renewal of the insurance policy after the insurable risk materialised. Mohd Nazlan J (now JCA) also concluded that there is no retrospective coverage of the policy as it operates only from the time of issuance.

[32] In *Liberty Insurance Bhd v. Marrison Sidai & Anor* (*supra*), the accident in question occurred around noon time on 19 May 2016. The cover note for the policy stated that the insurance coverage commenced at 2.51pm the same day. The argument of the accident victim who resisted the s. 96(3) application of the insurer was that the coverage commenced after midnight of the preceding day. Like in the present case, the policy owner did not resist the application of the insurer.

[33] In para. 47 of the judgment, Mohd Nazlan J had regard to s. 84 of the FSA and said as follows:

> [47] It bears emphasis that at the time of the accident at around noon on 19 May 2016, evidence is uncontroverted that premium payment had yet to be made. An insurer such as the plaintiff in the instant case is thus under the law in the FSA prohibited from assuming any such risk to provide insurance coverage based on the plain language of s. 84 of the FSA.

[34] His Lordship also considered the speculative nature of an insurance contract and the fact that the accident in question had occurred prior to renewal of the policy in the following paragraphs:

> (50) In the instant case, the specified event of a motor vehicle accident intended to be insured against was far from being uncertain. It had in actual fact become an absolute certainty because it had occurred before coverage became effective in terms of the timing of the application for coverage and payment of premium which was manifestly subsequent in time. I emphasise that when the first defendant applied for coverage, the accident had already happened. The contract of insurance could not have been validly created under such circumstances in the absence of the uncertainty of the specified event.

[35] We agree with the above observations of His Lordship. With regard to s. 84 of the FSA, we have also taken into account s. 270 of the same legislation that reads as follows:

> 270. Except as otherwise provided in this Act, or in pursuance of any provision of this Act, no contract, agreement or arrangement, entered into in breach or contravention of any provision of this Act shall be void solely by reason of such breach or contravention.

Provided that nothing contained in this section shall affect any liability of any person for any administrative, civil or criminal actions under this Act in respect of such breach or contravention.

[36] As we noted earlier, s. 84 prevents an insurer from assuming risks unless the premium payable is paid whereas the above-mentioned provision saves a contract from being voided solely by reason of breach any provision of the Act. However, in our respectful view s. 270 is not relevant because nothing in the policy in question states that the insurer had agreed to assume risks or provide compensation for accidents that had occurred before purchase of the policy or payment of premium. In any event, the time of issuance of the policy is clearly stated in the cover note.

[37] For the above reasons, the argument that there are triable issues and therefore a trial should be held to determine the enforceability of the insurance policy is without merit. Furthermore, s. 96(3) allows the insurer to avoid the policy if it obtains a declaration from the court before the date of liability. In the case of *Ahmad Nazrin Abd Halim & Anor v. Allianz General Insurance Company (M)* (*supra*), the Court of Appeal held that the date of liability refers to the date of judgment in the running down suit by the accident victim. Thus, the liability of the insurer only arises when judgment is entered against it. Therefore, an insurer who elects to seek a remedy under s. 96(3) does not have to wait until the running down action is tried in the Sessions Court. Furthermore, as we said early there is no triable issue with respect to the critical question of fact which is the time of the accident compared to the time of purchase of the insurance policy.

Waiver

[38] The argument that the s. 96(3) declaration should not have been granted is based on para. 5 of the Schedule 9 of the FSA. Sub-paragraphs (1) and (3) of para. 5 in Schedule 9 of the FSA, are in respect of the pre-contractual duty of disclosure of the insurer. Sub-paragraph (5) stipulates that the insured's obligation to disclose information shall be waived where the insurer elects not to require the insured to respond to specific questions pertinent to the insurer's decision on whether to enter into the contract of insurance.

[39] However, we find this argument to be irrelevant. The first respondent elected not to rely on the doctrine of *uberrima fides* to avoid the policy or to avoid coverage for the accident in question although it was mentioned in the affidavit in support. The principal basis of the application is that the policy was not in force at the time of the accident as it was purchased and paid for only after the accident had occurred.

[40] We are also of the view that had the first respondent invoked the doctrine of *uberrima fides*, sub-paras. (1), (3) and (5) para. 5 of Schedule 9 of the FSA would not have assisted the appellants to defeat it. Our reasoning is two-fold. First, the questions which the insurer is obliged to pose under

A sub-paras. (1) and (2) pertain to a "risk". The meaning of "risk" is not defined in Schedule 9. Its ordinary dictionary meaning denotes the possibility of something adverse, such as damage or loss, occurring in the future. This aligns with the speculative nature of an insurance contract as observed by the learned High Court Judge. In this context, it would be
B illogical to expect the insurer to ask any question under sub-paras. (1) and (3) concerning a "risk" that had already materialised. It may fairly be said that the accident in question does not constitute a "risk", as it had already taken place. Accordingly, reliance upon sub-para. (5) of para. 5 of Schedule 9 of the FSA, to assert a waiver for failing to inquire about the accident in
C question, is wholly untenable.

[41] Our second reason is that sub-para. (9) of para. 5 of Schedule 9 of the FSA expressly provides that nothing in the Schedule shall affect the mutual duty of utmost good faith owed by both the insurer and the insured. Therefore, the first defendant ought to have disclosed to the insurance agent
D that the vehicle in question had been involved in an accident immediately prior to the renewal of the insurance policy. Sub-para. (9) reads as follows:

> (9) Nothing in this Schedule shall affect the duty of utmost good faith to be exercised by a consumer and licensed insurer in their dealings with each other, including the making and paying of a claim, after a contract
E of insurance has been entered into, varied or renewed.

Article 8 Of The Federal Constitution

[42] Counsel for the appellants argued that the equality provision of the Federal Constitution had been breached by the s. 96(3) declaration that was obtained by the respondent. The point raised is that since the first respondent
F had intervened in the trial court in the running down action, it should not be permitted to obtain the declaration *via* originating summons in the High Court. The issue of enforceability of the policy should be determined in the trial court according to counsel for the appellant. For this reason, he argued that the High Court should have dismissed the originating summons.

G **[43]** We do not find the above argument to be persuasive. We have dealt with this argument to some extent earlier in this judgment. It pertains to the mode of proceeding. Section 96(3) allows an insurer to avoid a policy by seeking a declaration to that effect before date of liability which is the date of the running down judgment. The Rules of Court 2012 do provide for
H various matters that can be decided on affidavit evidence. They range from summary judgment applications to judicial review applications which sometimes involves matters of high constitutional importance. The s. 96(3) avenue applies to all litigants in the same class as the insurer, the insured and the third-party victim. We do not find anything discriminatory in it against
I the third-party victim. In fact, the landmark Federal Court case of *AmGeneral Insurance Bhd v. Sa' Amran Atan & Ors And Other Appeals* [2022] 8 CLJ 175; [2022] 6 MLRA 224 affirmed the right of the accident victim to be served with the s. 96(3) application of the insurer and appear at the hearing.

[44] Thus, the right of the insurer to obtain a declaration a motor insurance policy is void or unenforceable under s. 96(3) is not discriminatory against a third-party accident victim. As for the mode of proceeding, *ie*, whether by exchange of affidavits in an originating summons or by way of a full trial, in our view does not, in itself, bear upon the question of an infringement of the equality provision of the Federal Constitution.

Conclusion

[45] As we said previously, His Lordship did not declare the entire policy void. Instead, he granted the alternative prayer sought in the statement of claim. He granted a declaration that the policy did not extend to the accident in question, as the accident occurred prior to its purchase. We reiterate that the principal issue in this case is actually a narrow one: whether there was insurance coverage at the material time of the accident. For the reasons set out above, we concur with the learned Judicial Commissioner who answered this question in the negative.

[46] Hence, we affirm the decision of the High Court. The appeal is unanimously dismissed with costs of RM5,000 subject to allocatur.